

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

ORIGINAL **75-7339**

To be argued by
VICTOR S. CICHANOWICZ

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Nos. 7339/50/51

MICHAEL CASTELLANO,

Plaintiff-Appellee,

against

RUDOLF OETKER,

*Defendant and Third-Party
Plaintiff-Appellee-Appellant,*

against

BAY RIDGE OPERATING CO., INC.,

*Third-Party Defendant-
Appellee-Appellant,*

and

STANDARD FRUIT & STEAMSHIP CO.,

Third-Party Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

**BRIEF OF DEFENDANT AND THIRD-PARTY
PLAINTIFF-APPELLEE-APPELLANT,
RUDOLF OETKER**

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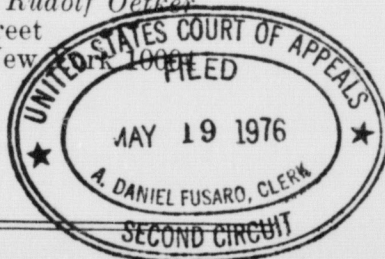


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United States Court of Appeals FOR THE SECOND CIRCUIT

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RUDOLF OETKER,
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF OF DEFENDANT AND THIRD-PARTY PLAINTIFF-APPELLEE-APPELLANT, RUDOLF OETKER

Statement

The judgment appealed from arises out of an action by a longshoreman against the owner (Rudolf Oetker) of a vessel (M.S. POLARSTEIN) to recover damages for personal

injuries which he sustained aboard said vessel when he was struck by a box of bananas which, as it was being discharged from the vessel, fell from the belt of a conveyor which was owned by Standard Fruit and furnished for use aboard the vessel, and had been installed aboard the vessel, and was being operated by employees of Bay Ridge. No ship's equipment or personnel were in any way involved in the discharging operation.

The plaintiff longshoreman's action against the shipowner was tried in the United States District Court for the Eastern District of New York before the Honorable Thomas C. Platt and a jury. The jury rendered a verdict finding the shipowner negligent and its vessel unseaworthy.

The claims of the shipowner against Standard Fruit and Bay Ridge for indemnity were tried by agreement before the trial Judge without a jury. The trial court awarded the shipowner full indemnity plus costs and counsel fees and directed that Bay Ridge and Standard Fruit each pay fifty (50%) percent of such indemnity.

Rudolf Oetker, as cross-appellant, joins in the arguments presented in the brief of Standard Fruit attacking the judgment entered herein insofar as it awards recovery to the plaintiff. As appellee, Rudolf Oetker joins in the arguments presented in the brief of Bay Ridge that the judgment was correct in directing indemnity against Bay Ridge and Standard Fruit for one-half the damages.

POINT I

The evidence does not support a finding of negligence on the part of the shipowner.

There is no dispute that the box of bananas which struck the plaintiff fell when the conveyor belt on which the box was resting "jumped" as the witness Jackson started running the belt (117). There was no evidence that on any prior occasion the belt either jumped or that the boxes fell off the conveyor because of a jumping of the conveyor belt. As the brief of United Fruit points out, the plaintiff's proof of shipowner negligence is based on two incidents when a so-called mate was present. One involves the falling of boxes for reasons unknown at some prior point in time on the date of the plaintiff's accident. The other involved the hanging up of boxes on the conveyor belt also at an unspecified time prior to plaintiff's alleged accident. On this occasion the longshoreman straightened up the boxes and the belt was started up again, without incident and the so-called mate departed. In *Rice v. Pan Atlantic Gulf & Pacific Co.*, 484 F.2d 1318, 1320 (2 Cir. 1973) this Court held that in order to find negligence the jury is required to find both that the alleged unsafe condition existed and that the shipowner had notice of it. Evidence such as there was in this case that boxes fell on a prior occasion for unexplained reasons or that on another prior occasion boxes became hung up on the conveyor belt but did not fall, not only is not evidence that a box would fall because the conveyor belt would jump, but also is not evidence on the basis of which a jury could reasonably find either actual or constructive notice.

Conclusion

Should the judgment in favor of the plaintiff against the shipowner be vacated and the complaint dismissed, the shipowner nonetheless should be awarded its costs and counsel fees. On the other hand, should this Court sustain the jury verdict in plaintiff's favor, the judgment awarding indemnity against both Standard Fruit and Bay Ridge should be affirmed.

Respectfully submitted,

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Due and timely service of Two copies
of the within Brief is hereby
admitted this 18 day of MAY 1976

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MAY 19 1976

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